No. 3180

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

In re
CHIN FONG,
On Habeas Corpus,
*Appellant,*

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, California,
*Appellee.*

## BRIEF FOR APPELLANT.

GEORGE A. McGOWAN,
Bank of Italy Building, San Francisco,
*Attorney for Appellant.*

No. 3180

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

---

In re
CHIN FONG,
On Habeas Corpus,
*Appellant,*
vs.
EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, California,
*Appellee.*

## BRIEF FOR APPELLANT.

### Statement of the Case.

Chin Fong, the appellant herein, is an alien Chinese person seeking to re-enter the United States through the Port of San Francisco after a temporary absence in China. The ground of re-admission is that Chin Fong was returning to a previously established commercial domicile in this country. The rejection by the Immigration authorities was upon the ground that notwithstanding the production of the statutory evidence as to mercantile status for one year prior to departure, the legality of the residence of Chin Fong prior to the said period of

one year was not established to their satisfaction and the application was for said reason denied. This briefly is the ground for the adverse decision of the Commissioner of Immigration and affirmed upon appeal to the Secretary of Labor. The adverse decision of the then Commissioner of Immigration, Samuel W. Backus, appears in the Immigration Record, and has also been set out in the return of the respondent and is as follows:

"Finding and Decree.

The applicant applied for preinvestigation of his alleged status as a merchant (Form 431) in December, 1911, but his application was denied by the Seattle office, and an appeal from that decision dismissed by the Bureau for the reason that it was satisfactorily shown at that time that the applicant had fraudulently secured his original admission to the United States, it having been claimed by him that he entered this country at or near Niagara Falls, New York, in 1897, on 'merchant's papers' sent to him in China by the Young Wah Hong Company at New York. It was first claimed by the applicant in the present case, that he was admitted at Niagara Falls in 1906, but when confronted with his previous testimony he denied the last mentioned statement and reiterated the year first mentioned as the date of his original entry, and stated that he was then admitted as a section six Canton merchant on papers secured by him in that city.

Niagara Falls was not a port of entry for Chinese in 1906, and the applicant has not satisfactorily accounted for the present whereabouts of the papers on which he claims to have been admitted, so that it must be concluded that his domicile in this country was unlawful; and as the Bureau has sustained the action of the

Seattle office in refusing his application for Form 431, the applicant is denied admission and advised of his right of appeal.

Dated this 6th day of February, 1914.

(Signed) Samuel W. Backus,
Commissioner."

The adverse decision of the Acting Secretary of Labor is also set forth in the return, and is as follows:

"The original entry of this man was obtained by fraud. He cannot predicate any right whatever upon the basis of fraud. The fact that he has been permitted to remain in this country constitutes no waiver of the right to deport him, and the fact that the Government has not heretofore affirmatively exercised the authority to deport him, while it amounts to tentative permission to remain here, does not preclude or estop the Government from exercising its authority to deport or deny admission at any time. A different question would be presented were the facts such that it did not appear that the alien's original entry was fraudulent. No business he might engage in nor length of residence here can cure the fraud perpetrated by him in gaining admission in the first instance.

This case appears to be quite fairly within the Mack Fock decision which, in my opinion, is correct.

The recommendation that admission be denied is approved.

J. B. Dinsmore,
Acting Secretary."

A writ of habeas corpus was applied for and denied. The views of the lower court are reported in 213 Fed. 288. An appeal was taken to the Supreme Court of the United States upon the mis-

taken theory that the construction of a treaty was involved. The views of the court thereon are reported in 241 U. S. 1 wherein the appeal was dismissed for want of jurisdiction. Extracts from the opinion follow:

> "The appeal is direct from the District Court, and can only be sustained against the motion of the United States to dismiss for want of jurisdiction in this court if there is a substantial question under the constitution of the United States, or a treaty made under their authority, 238 of the Judicial Code (36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, 1215) permitting an appeal from a district court when a constitutional question is involved and in any case 'in which * * * the validity or construction of any treaty made under its (United States) authority is drawn in question.
>
> * * * * * * *
>
> We think, therefore, there is no substantial merit in the contention that the case involves the construction of a treaty, and that the rights of petitioner can rest only upon the statutes regulating Chinese immigration. So concluding we are not called upon to decide or express opinion whether petitioner's original entry into the United States and his subsequent residence therein were illegal, and whether he could acquire by either a status which the immigration officers were without power to disregard. Dismissed."

Upon permission of the lower court Chin Fong was permitted to again file a petition for a writ of habeas corpus, basing his claim for relief upon rights vested by the statute and not rights previously supposed to flow from the treaty with China. To this petition was annexed the Immi-

gration Record in the case of Chin Fong. An amendment to the petition was thereafter filed, an order to show cause was issued, and thereafter the respondent filed a return thereto. Upon the hearing had thereon five written exceptions were allowed upon behalf of Chin Fong to rulings by the lower court adversely to his legal contentions.

An agreed statement of facts by stipulation of counsel, approved by the lower court, as to the proceedings before the lower court upon the hearing appears of record. By stipulation and order the Immigration Record was withdrawn from the office of the clerk of the lower court and was filed with the clerk of this court for use upon this appeal.

The petition alleges that Chin Fong is applying for re-admission as a returning merchant previously engaged in business in New York City, and that he submitted the evidence required by statute. The statute in question is Section 2 of the Act of Congress of November 3, 1893 (28 Stat. at L. 7 Chap. 14, Comp. Stat. 1913 § 4324) and the part thereof that is relevant reads as follows:

> "The term 'merchant' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant.

> Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landing."

That portion of the report of the Inspector in charge of the New York office, H. R. Sisson, dated January 15, 1914, upon the testimony covering Chin Fong's mercantile status for the statutory period of one (1) year is as follows:

> "In view of the fact, however, that while this application was denied in January, 1912, he did not depart from the United States until November 23rd, 1912, a further investigation has been made covering this period, and attached to the record will be found in triplicate the sworn statement of Chin Fong, the manager of the firm, together with those of the statutory witnesses, Messrs. Israel Brand and John L. Delmonte, both of whom are business men, and so far as this office knows, reputable. * * *
>
> Kwong Mow Lan & Co. are engaged in manufacturing cigars at No. 8 Pell street, where they also dispose of them at retail as well as wholesale, and it is believed to be a bona fide establishment. H. S. Sisson, Inspector in charge."

The views of the lower court thereon may be found in the opinion on the first application for a writ (213 Fed. 288):

> "Dooling, District Judge. The petition shows that petitioner, Chin Fong, who had been a resident of the United States for a number of years, departed for China in November, 1912; that before he left he applied for a preinvestigation as to his status as a merchant, and a certificate was denied him, on the ground that his original entry into this country was surreptitious; that, notwithstanding this denial, the petitioner left the country, and is now endeavoring to re-enter as a returning Chinese merchant; that he presents the affidavits of a member of the New York firm to which he claims to belong and of two reputable Americans supporting his claim; that notwithstanding these facts, he has been denied admission and ordered deported on the same ground that his preinvestigation certificate was denied, that is to say, because his original entry was surreptitious; that in so deciding the immigration department has exceeded its authority, as that question can only be determined under the exclusion laws by a justice, judge or commissioner.
>
> This, briefly stated, is the body of the present petition for a writ of habeas corpus. To this petition a demurrer has been interposed. I am of the opinion that the demurrer must be sustained. Had the petitioner been content to remain in this country he could have been deported only after a hearing before a justice, judge or commissioner. But as he left the country voluntarily and even after a preinvestigation certificate was denied him, the question of his right to re-entry lies peculiarly with the immigration department, and as they have found that he is not entitled to re-enter, such finding cannot be disturbed. A different rule prevails, and a different tribunal determines in the case of a Chi-

> nese applying to enter from that of one already in this country, whom it is sought to deport, under the exclusion laws.
>
> The demurrer will therefore be sustained, and the application for a writ denied."

While the petition alleges that the detained has presented the evidence required by statute of a returning Chinese merchant, the return makes denial of this allegation. The return, however, is to be interpreted in the light of what is contained in the Immigration Record. I do not understand that the respondent takes any exception to the sufficiency of the evidence presented upon behalf of the detained touching his mercantile status in this country for a period of one year prior to his departure other than as the same may be affected by the antecedent question as to whether or not his former residence in this country had a legal foundation. In other words, it is the contention of the Immigration Department that Section 2 of the Act of November 3, 1893, supra, is to be construed as containing an additional requirement other than those appearing upon the face thereof substantially to the effect that the person claiming to be such returning merchant must also have legally entered the United States in the first instance, and that the Immigration authorities in an admission case were also vested with authority and had jurisdiction to determine the question of the legality of the returning merchant's residence prior to the period of one year mentioned in the statute. The respondent claims that these disputed powers exercised by him

are contained in said Section 2 of the Act of November 3, 1893, and that the said disputed powers though not visible on the face thereof, are to be found in a proper statutory construction of the said section. The petitioner claims that the exercise of these disputed powers is not the result of statutory construction but really amounts to *legislation,* which is a function reserved for Congress and not conferred upon the Immigration authorities.

The petition next alleges that the detained first entered the United States during the year 1897 in a legal manner and without fraud, upon the production by him of a merchant's certificate issued in China under the terms of Section 6 of the Act of Congress of July 5, 1884, and that prior thereto and to facilitate in the issuance thereof, by showing to the authorities in China that in the event of his being permitted to go to the United States he would follow a mercantile pursuit there, he had had papers prepared by the firm of Young Wah Hong Co. of New York City, showing that he would become affiliated with that firm as a merchant upon his subsequent arrival here. The respondent denies this allegation in his return. Upon the hearing the court declined upon jurisdictional grounds to receive evidence from the petitioner to support this averment.

The petitioner finally alleges that the detained has never in this proceeding had a hearing before competent and legal authority invested with power to determine the matter as to whether his prior

(ante-dating the statutory period of one year) residence in this country was legal or otherwise or whether his original entry into the United States was legal or otherwise, and that the action of the Immigration authorities in so adversely determining, usurped the functions vested in the Federal Judiciary by Section 12 of the Act of Congress of May 6, 1882, and Section 13 of the Act of Congress of September 13, 1888. The denial of this allegation by the respondent is based upon their construction of the statutes that in an admission case they are additionally invested with powers which in a deportation case may only be exercised by the judiciary, that is a justice, judge or commissioner.

In the amendment to the petition it is alleged that since Chin Fong's admission to bail in the earlier habeas corpus proceeding, a period of 2½ years, he has resumed his mercantile pursuits and been such a merchant of Kwong Mow Lan & Co. of New York. The return denies this. Upon the hearing the lower court refused upon jurisdictional grounds to receive evidence thereon in support thereof.

---

**Argument.**

While there are five exceptions taken in this case, exceptions Nos. 1, 2 and 4, are so co-related that they will be consolidated and treated as one point. The third exception is complete in itself. The fifth and last exception is a general one which may be considered as merged in the two points

which these five exceptions are resolved into. The enumeration follows:

FIRST.

Whether, in the case of a Chinese merchant, seeking readmission into the United States, after a temporary absence therefrom, the Immigration authorities have jurisdiction to refuse admission to the applicant, when he has submitted the evidence of two credible witnesses other than Chinese to the effect that he was a Chinese merchant, as defined by the Chinese Exclusion and Restriction Act for upwards of the period of one year prior to his departure from the United States, and, whether said authorities have exclusive, concurrent or in fact any jurisdiction in such admission proceedings, to pass upon the legality of the antecedent (prior to said period of one year) residence of such merchant, including whether he legally entered the United States approximately 15 years prior thereto, and by said act prevent such person from having his status ante-dating the said period of one year, heard, examined into and adjudicated by the judicial branch of the Government.

SECOND.

Whether a Chinese merchant released on bond in an admission proceeding may be heard to urge in a subsequent habeas corpus proceeding the fact that he has continued to follow an exempt mercantile status in his same mercantile establishment during the 2½ years which intervened between the

two said proceedings that he had been at large upon bond.

First: Let it be understood at the outset that this applicant does not question the authority of Congress to deal with aliens, either resident within the United States, or seeking re-admission thereto. The question at issue has not to do with the power or authority of Congress, but is concerned solely with the interpretation of actual Congressional legislation.

At the beginning of the policy of Chinese Restriction or Chinese Exclusion Congress foresaw that different questions would arise touching on the one hand the right of admission of Chinese persons, and on the other hand, the right of expulsion of Chinese persons. Thus we find in the first Act of May 6, 1882, as the same was shortly thereafter amended on July 5, 1884, that the provisions with respect to the admission of Chinese were confined to the EXECUTIVE branch of the Government, and are covered in Section 9 of the Act, whereas, when the question of the legality or illegality of the residence of Chinese persons within the United States is the point at issue, this was confined to the JUDICIAL branch of the Government, all as provided in Section 12 of said Act. Section 9 is as follows:

> "That before any Chinese passengers are landed from any such vessel, the Chinese inspector in charge, shall proceed to examine such passengers, comparing the certificates with the list and with the passengers; and no pas-

senger shall be allowed to land in the United States from such vessel in violation of law."

The material part of Section 12 is as follows:

"And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled to be or to remain in the United States; * * *"

It may be contended that an attempt was made in subsequent legislation to broaden out the authority of the executive officers in admission cases. Thus we find the Act of September 13, 1888, provided in Section 12 thereof as follows:

"The collector shall in person decide all questions in dispute with regard to the right of any Chinese person to enter the United States and his decision shall be subject to review by the secretary of the treasury and not otherwise."

This last mentioned Act of Congress, however, was not to go into effect until the ratification of the then pending treaty with China. The treaty in question was never ratified, and hence certain sections of this Act including Section 12 have been adjudicated by the Supreme Court of the United States never to have gone into effect. In Li Sing v. United States, 180 U. S. page 486, it is provided that:

"Without finding it necessary to say that there are no provisions in the Act of Septem-

> ber 13, 1888, which, from their nature, are binding on the courts, as existing statements of the legislative will, we are ready to hold that Section 12 of that Act cannot be so regarded."

There were a number of sections of this Act of Congress of September 13, 1888, which did go into effect, and the one which we are concerned in is Section 13, which had to do with the expulsion of Chinese persons from the United States, and which particular section has been specifically re-enacted in all continuing Chinese legislation. The part material to this inquiry is contained in the first paragraph thereof and is as follows:

> "That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its Territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge or commissioner of any United States Court, returnable before any justice, judge or commissioner of a United States Court, or before any United States Court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came."

The next Chinese legislation, any portion of which is now in effect, is the Act of May 5, 1892, which is commonly known as the Geary or Chinese Registration Act. The enacting clause of this Act continued in force all existing Chinese legislation. Sections 2, 3 and 6 specifically re-enforce and bestow

new and additional jurisdiction on the judicial branch of the Government having to do with the deportation of Chinese persons out of the United States upon the question of the legality or illegality of their prior residence. The Chinese did not comply with this Geary Act and contested its constitutionality before the Supreme Court. The Act was upheld, and Congress passed the subsequent Act of November 3, 1893, which is popularly known as the McCreary Act, extending the time for registration of Chinese for a period of six months. It is this Amendatory Act of November 3, 1893, which continues and re-enacts the jurisdiction of the judicial branch of the Government, which also defines the term "merchant" as used in the Chinese Exclusion Acts and provides the exact manner and by what class of witnesses such Chinese merchant should establish the necessary facts to regain admission into the United States. In this Section 2 of the Amendatory Act, which is set forth in the statement of the case contained in this brief, no mention is made of authority or jurisdiction on the part of the executive officers to conduct an investigation for the purpose of determining anything with respect to such Chinese merchant excepting his status for the period of one year prior to his departure from this country. In the case of Chin Fong, this applicant, these executive officers have, as we contend, usurped jurisdiction and attempted to determine that Chin Fong illegally entered the United States in the latter part of 1896 or the early part of 1897,

which would be a matter of fifteen or sixteen years ante-dating his departure from the United States upon such temporary visit to China, which was in the year 1912. It is, of course, obvious that it is most important for this petitioner as to whether that point may only be determined by the judicial branch of the Government as he contends, or whether it may only be determined by the executive branch of the Government, as the respondent contends. The difference between these two methods of procedure was recently commented upon by the Supreme Court in an opinion written by Justice McKenna, wherein in the case of United States v. Woo Jan, 38 Sp. Ct. 207, it is held:

> "The remedies are too essentially different to be concurrent. And yet we are asked to decide that the law which permits the first, that is, permits the deportation of an alien simply upon the warrant or determination of an executive officer, is not an amendment or alteration of a law which prohibits it. And there can be no doubt of the result if such decision be made. The summary and direct remedy of Section 21 will always be used. No Chinese person will be given the formal procedure of the Exclusion Laws with their safeguards. The cases demonstrate this and we cannot believe that Congress was insensible of it and left it possible. Nor can we ascribe to Congress a deliberately deceptive obscurity and an intention, by the use of words which can be given a double sense, to grant a right that can have no assertion. We must, indeed, assume that section 43 was intended to be sufficient of itself—fully exclusive and controlling."

Before leaving this branch of the case it might be well to call attention to the fact that while the administrative officers held original jurisdiction to try and determine the right of Chinese persons to enter the United States within the statutory authority hereinbefore mentioned, their decision was not specifically made final by Congress, and hence all such applicants for admission, if they felt aggrieved by the adverse action of the executive authorities, had recourse to the judicial branch of the Government through the medium of a writ of habeas corpus. It was not until August 18, 1894 (28 Stat. pages 327-390), that in a rider to the General Appropriation Bill Congress provided as follows:

> "In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Commerce and Labor."

I have never heard any authority on the Chinese Exclusion or Restriction Acts who claimed that this last mentioned Act created any new authority, but on the contrary, it obviously merely rendered final and exclusive an authority which had been previously vested in the executive officers in question. The Supreme Court of the United States recently determined in the case of Low Wah Suey v. Backus, 225 U. S. 460, with respect to the finality of the decisions of executive officers as follows:

> "A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final."

This brings us to the point where this appellant contends that the action of the executive authorities in this case is not within the authority of the statute. It is obvious that this appellant has met every requirement imposed by the statute, which provides the terms and conditions upon which a Chinese merchant may re-enter the United States after a temporary absence abroad. There is nothing in this statute which vests the executive officers with power to investigate and determine whether or not such a returning merchant legally entered the United States, a matter of some fifteen or sixteen years prior to his departure upon said temporary visit to China, and it is therefore contended that the action of the said executive authorities in denying this returning merchant permission to re-enter the United States, after he has met the requirements of the statute as it affects returning Chinese merchants, and basing their denial upon reasons not confided to their jurisdiction by the section, that their action is for said reason null and void and

without their statutory authority. The petitioner claims that the exercise of these disputed powers is not the result of statutory construction, but really amounts to legislation, which is a function reserved for Congress, and not conferred upon the immigration authorities. In the case of Morrill v. Jones, 106 U.S. 466, the Supreme Court of the United States held, in an opinion written by Chief Justice Waite, as follows:-

> "The secretary of the treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what congress has enacted. In the present case we are entirely satisfied the regulation acted upon by the collector was in excess of the power of the secretary. The statute clearly includes animals of all classes. The regulations seek to confine its operation to animals of 'superior stock'. This is manifestly an attempt to put into the body of the statute a limitation which congress did not think it necessary to prescribe. Congress was willing to admit duty free all animals specially imported for breeding purposes. The secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

~~without their statutory authority.~~ Circuit Judge Gilbert in the case of Leong Youk Tong, 90 Fed. 648, decides as follows:

> "If there has been a decision in this case such as the statute contemplates, the decision is final, and can be reversed only on appeal to the secretary of the treasury. This court has no authority, by writ of habeas corpus or otherwise, to review it. Lem Moon Sing v. U. S., 158 U. S. 538, 15 Sup. Ct. 967. The courts have interfered only in cases where the applicant for admission was about to be deported under an order which denied him a hearing, or denied his right of appeal (In re Gottfried, 89 Fed. 9; In re Gin Fung, 89 Fed. 153; In re Monaco, 86 Fed. 117); and in cases where he has been denied the right to land for reasons which the law does not recognize as ground for his exclusion (In re Kornmehl, 87 Fed. 314). If, in this case the collector had in fact decided, as was indicated in his verbal statement to the petitioner's counsel, that the petitioner was a merchant, and, as such, entitled to admission into the United States, but that he was denied admission for some other reason not connected with his status as a merchant, and not by statute or treaty made a ground of exclusion, the order of deportation would undoubtedly be void. Such appeared to be the facts as they were set forth in the petition for the writ."

The damage done to this appellant by having the question of the legality or illegality of his residence in the United States ante-dating the period of one year prior to his departure therefrom passed upon by the administrative officers arises from the fact that these administrative officers as a proposition of law, hold that if the residence of a Chinese per-

son within the United States is for any reason illegal, that a legal status could never be predicated or based thereon. The judicial branch of the Government, on the contrary, have repeatedly held that a Chinese person or an alien illegally within the United States may thereafter acquire a legal and lawful residence in a variety of ways. There are a number of decisions bearing upon this point which were recently presented before this Honorable Court in the case of Gin Dock Sue v. United States, No. 2858, and it is the decision rendered by this Honorable Court in this last mentioned case upon which this appellant mainly relies. The legal status of Gin Dock Sue is distinguished from the legal status of Chin Fong in this that Gin Dock Sue did not satisfy the port officials that he was a merchant for a year prior to his departure for China. He was denied re-admission and the excluding decision was affirmed on appeal, so his right to re-admission had been adversely adjudicated by the competent administrative officials, when he escaped from detention, and after the lapse of many years he was arrested under a deportation proceeding before the judicial branch of the Government. The part of the decision bearing upon the mercantile status cites many of the earlier decisions of the Circuit Court of Appeals and other District Courts bearing upon the point in question, and it will be in the interests of expedition to give the entire decision of the Circuit Court of Appeals upon this point:

> "It is urged in support of the second contention that, appellant having remained within

the United States for the period of three years, he cannot now be deported, although his entry was irregular: This for two reasons, namely, (1) that he was not proceeded against within three years in pursuance of section 21 of the general act to regulate the immigration of aliens into the United States; and (2) that his status has been that of a merchant in the meantime—indeed, it is said, for six and a half years prior to the present hearing.

It is quite true that an alien may not be deported after three years' residence, who has violated no law except that he is here through an irregular entry, if he is not otherwise chargeable with personal immorality. United States vs. Wong You, 223 U. S. 67. In the present case, however, the appellant has been proceeded against within the three years. He was, in fact, proceeded against instantly upon his attempt to effect a re-entry, and his right to reenter was adjudged adversely to his contention. The three years have elapsed with this order and judgment standing against him, neither reversed nor annulled. In other words, the judgment in the meanwhile has been in effect declarative of his unlawful status, as being within the country surreptitiously.

This brings us to the inquiry whether, notwithstanding the order and judgment that he was without the right or privilege of re-entry, his remaining within the United States surreptitiously for more than three years, with the status of a merchant, cures his unlawful entry.

In Tsoi Sim vs. United States, 116 Fed. 920, which involved the right to remain in the United States of a Chinese woman who lawfully entered before the Chinese exclusion act was enacted, and remained there afterwards but failed to register as required, and was thereafter lawfully married to a citizen of the United States, it was held that, by reason

of her marriage, appellant took the status of her husband, and was not subject to deportation: the court assuming that she was subject to deportation previous to her marriage.

So it was held respecting a French woman who, pending proceedings for her deportation under the immigration laws, married a citizen of the United States, by reason of having taken the status of her husband, she was entitled to remain. Hopkins vs. Fachant, 130 Fed. 839.

In Ex parte Ow Guen, 148 Fed. 926, the relator, a Chinaman was a resident of this country before the adoption of the Chinese Exclusion Act. He went to China, leaving the affidavits of two white witnesses showing him to be a merchant in Lowell. On his return he was refused admission because, although a merchant in fact, he was said not to be in law, as he had been a laborer and remained unregistered. He came again, and applied for admission as a merchant, but was ordered deported because he had been an unregistered laborer. The court held that the relator, as an unregistered laborer was entitled to all the rights of a resident alien until proceeded against and deported, among others, the right to become a merchant, and that, when he became a merchant, he had all the rights of one under the law. This was not a case of curing an unlawful entry by becoming a merchant. It was merely a case in the end where, a Chinaman having applied to enter as a merchant, and having been denied entry on the ground that he had been formerly within the United States with the status of a laborer, it was declared that he had the right to change his status, and, having done so, in pursuance thereof had the right of re-entry as a merchant.

These cases are not controlling here. If appellant's re-entry had been surreptitious only, the case would be different. He came and applied for re-entry, and was adjudged not to be

> entitled thereto. After the judgment had gone against him, he escaped, and remained in the country in spite of the efforts to deport him in pursuance of the order and judgment of the Commissioner of Immigration. It does not seem to us that an unlawful resistance of a lawful order and judgment, however long continued, can have the effect to outlaw such order and judgment. It is not through the neglect of the Government that the order has not been executed, but through the adroitness of appellant in keeping himself secreted. We think, therefore, that, while appellant's long residence in this country might have cured a merely surreptitious entry, it does not cure an unlawful resistance of the judgment and order of deportation. To hold otherwise would be to encourage resistance to lawful authority."

Reverting now to the facts of the case of Chin Fong, we find that the Commissioner of Immigration in his finding and decree sets forth as follows:

> "That it was satisfactorily shown at that time that the applicant had fraudulently secured his original admission to the United States. * * * So that it must be concluded that his domicile in this country was unlawful."

Whereas the affirming decision by the Acting Secretary of Labor is in part as follows:

> "The original entry of this man was obtained by fraud. He cannot predicate any right whatever upon the basis of fraud. The fact that he has been permitted to remain in this country constitutes no waiver of the right to deport him, and the fact that the Government has not heretofore affirmatively exercised the authority to deport him, while it amounts to tentative permission to remain here, does not preclude or estop the Government from exercising its

> authority to deport or deny admission at any time. A different question would be presented were the facts such that it did not appear that the alien's original entry was fraudulent. No business he might engage in nor length of residence here can cure the fraud perpetrated by him in gaining admission in the first instance."

By referring to the testimony in the case itself, and giving the widest possible scope to the contention of the administrative officers of the Government, the most that can be drawn therefrom as a legal conclusion is that deduced by the lower court in its opinion wherein Judge Dooling decides:

> "* * * that notwithstanding these facts he has been denied admission and ordered deported on the same ground that his pre-investigation certificate was denied, that is to say, because his original entry was surreptitious. * * *"

So that in the last analysis we are confronted with a *maximum contention of the respondent that Chin Fong's original entry into this country in 1896 or 1897, or even as late as 1907, for that matter, was surreptitious. Merely this, and nothing more.* There is no evidence or finding or conclusion that Chin Fong has ever labored at any time during his residence in the United States. This Honorable Court in the Gin Dock Sue case has held that:

> *"if appellant's re-entry had been surreptitious only, the case would be different"*; * * * *"we think, therefore, that while appellant's long residence in this country might have cured a merely surreptitious entry,* it does not cure an unlawful resistance of the judgment and order of deportation."

We therefore contend that the sole point of law involved in this case as it affects *"a merely surreptitious entry"* has already been determined by this court in favor of this appellant, in the Gin Dock Sue case. There is no contention here that this appellant had been denied admission and thereafter escaped, which is the distinguishing feature in the Gin Dock Sue case.

Other cases illustrative of the point that a legal domicile and exempt status will be recognized in the absence of evidence showing a legal entry as well as where a prior residence was admitted to be illegal, are to be found in the following cases:

United States v. Wong Lung, 103 Fed. 794;
In re Russomanno, 128 Fed. 528;
In re Tom Hin, 149 Fed. 842;
Botis v. Davies, 173 Fed. 996;
United States v. Lee You Wing, 208 Fed. 166;
United States v. Lee You Wing, 211 Fed. 939.

So far in the presentation of this matter and for the purposes of the argument, I have not contested the point that the Immigration officials have claimed that Chin Fong's entrance into the United States was surreptitious or fraudulent. The appellant in fact does not make this concession, but contends that his entry into the United States was in a perfectly legal manner. The finding by the Immigration officials that his entry was surreptitious is

against the weight of the evidence and is a pure abuse of discretion. The Immigration officials base their conclusion of illegal entry upon the sole fact that this appellant claimed to have entered the United States as a Section 6 merchant in the latter part of 1896 or the first part of 1897, and the conclusion of illegality is based upon the fact that the applicant said the papers were sent to China to him from this country, whereas in point of fact, to have been a Section 6 Chinese merchant, they must have been made in China prior to his departure from that country for the United States. Exactly this same confusion with respect to such papers was before the Circuit Court of Appeals for the Second Circuit, in the case of U. S. v. Chin Len, reported in 187 Fed. 544, wherein the court treating the testimony of quite the same character held as follows:

> "The same observations are true regarding the alleged fraud in affixing the commissioner's seal and the perfectly obvious mistake of the relator in saying that he received the certificate when he was in China, evidently confusing it in his mind with a document to be obtained in Hong Kong before coming to this country."

In the present case we contend and felt that we should have had an opportunity of proving before the court that this appellant entered the United States as claimed by him in the latter part of 1896, upon a Section 6 certificate issued in China, but to facilitate in the issuance of this certificate papers had been prepared in the United States for the

purpose of showing that Chin Fong would become and be a merchant after his entry into the United States. Evidence of this fact would have at once exploded the theory of the Government that his entry was surreptitious or fraudulent.

When this appellant was an applicant for re-admission into the United States, it appears in the transcript of his examination that he said he entered the United States in 1906, whereas in his application for a Form 431 certificate prior to his departure for China, he stated that he had originally entered the United States in 1896 or 1897. In point of fact it is to be observed that the dates given are translations from the Chinese dates, which were the ones given by the applicant. When the applicant applied for a Form 431 certificate he stated that he originally entered the end of the 22nd year Kwong Suey, which translated would be the latter part of the year 1896 or the first part of the year 1897. When Chin Fong was questioned as an applicant for re-admission he stated, according to the transcript, that he had originally entered the United States in K. S. 32 year, which translated would be 1906. Thus the error was a mistake of ten years.

The commissioner states that when the attention of the applicant was directed to what he had stated prior to his departure for China, that he immediately corrected it, and stated that he had entered in K. S. 22 (1896-7). By referring to the examination of the applicant it will be seen that the state-

ment that he originally entered the United States in K. S. 32nd year must have been an unintentional error, because the applicant is called upon to account for his occupation during his years of residence in the United States. If the applicant originally entered the country in 1906-1907, and his prior examination was in 1911, he would have had an interval of four or five years to account for. In his examination he proceeds to state that he was a member of the Chinese drug store of Young Wah Tung for six years, three years of which they were on Mott Street and three years on Pell street, and he was thereafter employed as a salesman and prescription clerk in the drug store of Quong Hai Chung Co. for three years, and then, in addition to that, he was a member of Quong Mow Lung & Co. for another three years, thus accounting for steady occupation of twelve years during his residence in this country, which shows conclusively that the applicant simply made a slip of the tongue or was misunderstood when his expression was recorded as K. S. 32 instead of K. S. 22, which would have been ten years earlier. After the applicant had accounted for the steady occupation of over twelve years he was, upon a subsequent date, confronted with his former statement that he had originally entered the United States in K. S. 22, and his answer is as follows:

> Answer. "I said K. S. 22 I did not say K. S. 32 in my last statement." * * * "I thought you meant K. S. 22 instead of 32 when you asked me whether it was correct or not."

He describes his entry into the United States as follows:

> "A. I really came in K. S. 22, arriving in the United States across the border in the 5th month. I left China in the 4th month.
>
> Q. How did you cross the border? A. All the aliens were stopping at Montreal and there were two white men who called our names, and we went to Niagara Falls with them.
>
> Q. Didn't you cross the border surreptitiously and not through the regular Government channels? A. I was examined in a big building in Niagara Falls; after my examination I was taken to the train by the same man who examined me and put me on the train to New York.
>
> Q. You claim to have a section 6 paper and to have lost it. Is that correct? A. I do not know exactly what kind of a paper I had. I was young then— I do not know what kind of a paper, but I had a paper.
>
> Q. Describe it? A. Two page paper with my photograph attached to it and a lot of writing on it. There was also a gold seal on it. I got it at Canton City."

We feel that the Immigration Department officials view this testimony in too strict a manner, when we take into consideration the great many years that have elapsed since the events in question took place. This applicant entered the United States in 1896, a matter of some twenty-two years ago. It is not to be expected that his recollection of events in question would be as perfect as they were when the event transpired. A Chinese person coming to the United States from China at best has a pitiable inadequate conception of our modes and

methods of procedure relative to the laws and regulations with respect to Chinese persons. He goes through a certain procedure, all of which is new and strange to him, and then he finally knows that he is permitted to enter the United States, but many of the precise details or circumstances relating to his entry may be unknown to the applicant, or their importance not impressed upon his mind, so that after the lapse of many years, they have quite substantially faded from his mind. The Supreme Court of the United States has taken this view with respect to such examinations, and the attention of this Honorable Court is directed to the case of Tom Hong v. United States 193 U. S. 517, wherein it is held:

> "We do not find it necessary to determine this question in the cases now before us, for, in the opinion of the court, the testimony shows that the appellants were 'merchants' within the definition laid down by the law."
>
> * * * * * * *
>
> "It is true that after the lapse of so many years the appellants, when taken before the commissioner, were unable to produce the books or articles of copartnership of the firm. But some allowance must be made for the long delay, in their prosecution by the Government, and the natural loss of such testimony years after the firm's transactions were closed."

Tom Hong's case just cited, was decided by the Supreme Court March 21, 1904, a matter of ten years after the passage of the Registration Act, and it is therefore seen that the allowance mentioned by the Supreme Court had to do with the question

of the recollection of witnesses, after the passage of about seven or eight years, after allowance is made for the time consumed in getting the case before the Supreme Court, whereas in the present case, the testimony with respect to the applicant's admission into the United States relates back over an intervening period of sixteen or seventeen years, or substantially twice the period of time involved in the case of Tom Hong v. United States, supra.

In finally submitting this point to the consideration of this Honorable Court, we feel that the Government has not made out any showing at all that the prior residence of this applicant in the United States was illegal, or that he had entered the United States in a surreptitious manner, but on the contrary, that all of the evidence shows that the applicant entered this country in a lawful and a legal manner, and that his subsequent residence herein was perfectly legal. We feel the further fact should not be lost sight of, and that is, that this applicant lived in this country from his original entry in 1896 to his departure therefrom in 1912, a matter of sixteen years, and never during that period of time did the Government question his residence or bring any proceedings against him to have him deported from the United States. Upon this point we call the attention of the court to the case of United States v. Lee You Wing, 211 Fed. 939, decided by the Circuit Court of Appeals for the Second Circuit, wherein, on page 941 it is held:

> "The court below attached, and we think properly, some significance to the fact that, although he was refused a certificate on April 8, 1910, no steps were taken to have him deported until October 22, 1912, two years and six months afterwards. If he was unlawfully within the country in 1910, it was the duty of the officials of the Government to have taken steps at that time to have him arrested and deported. The fact that during this long period of inaction the Government made no move against him implies a lack of confidence in its case. We are also inclined to attach some importance to the fact that the defendant voluntarily applied to the Government officials in 1910 for a certificate to establish his status as a merchant. It is extremely doubtful whether he would have ventured to make such an application if he had entertained a doubt as to his ability to establish the facts necessary to sustain his application, with the danger of deportation threatening him if he brought the matter to the attention of the Government and failed to secure the certificate."

Second. Upon the second point relied upon in this matter we have to say that since the discussion on this point, the decision of this Honorable Court in the case of Gin Dock Sue v. Backus, supra, has been announced, and it is felt that that decision would be controlling on this point adversely to the applicant. We do feel, however, that it is important as evidence corroborative of the showing made upon behalf of this applicant that he is and was a bona fide merchant within this country during all the time as claimed by him. The fact that during the 2½ years that he was at large upon bond was spent by him actively engaged in business as a mer-

chant in the same mercantile establishment of which he was a member, and which he submitted to the investigation of the Government authorities prior to his departure from the United States, and also after his return thereto, is certainly evidence of a most convincing character that his mercantile occupation is an honest and sincere one, and that it is entitled to recognition as such, by the Governmental authorities of the United States.

---

In finally concluding and submitting this matter for the consideration of this Honorable Court, we feel, upon the evidence presented in this matter and the points urged upon behalf of this applicant, that the appeal should be sustained with instructions to the lower court to issue the writ as prayed for, to the end that this applicant may be discharged from custody. The contention of the Government that this applicant is beyond the protection of the court upon the question of the legality or illegality of his prior residence in this country, in view of the authorities cited and the action of Congress as set forth is, to our minds, an untenable one, and there is no language more apt or more fitting in which to submit this matter to this Honorable Court than the language of the late ~~Chief~~ Justice Field in the case of Wong Wing v. U. S., 163 U. S. 228, wherein he held as follows:

> "The contention that persons within the territorial jurisdiction of this republic might be

beyond the protection of the law was heard with pain on the argument at the bar,—in face of the great constitutional amendment which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. Far nobler was the boast of the great French cardinal who exercised power in the public affairs of France for years, that never in all his time did he deny justice to any one. 'For fifteen years,' such were his words, 'while in these hands dwelt empire, the humblest craftsman, the obscurest vassal, the very leper shrinking from the sun, though loathed by charity, might ask for justice.'

It is to be hoped that the poor Chinamen, now before us seeking relief from cruel oppression, will not find their appeal to our public institutions and laws a vain and idle proceeding."

With the foregoing this case is respectfully submitted for the consideration of this Honorable Court.

Dated, San Francisco,
October 16, 1918.

Respectfully submitted,

GEORGE A. MCGOWAN,
*Attorney for Appellant.*